

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 206 of 2003

in

SPECIAL CIVIL APPLICATION No 5354 of 2002

with

CIVIL APPLICATION No 1401 of 2003

For Approval and Signature:

HON'BLE DR.JUSTICE J.N.BHATT

and

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

REGIONAL DIRECTOR

Versus

ALLOCARE LABORATORIES

Appearance:

1. LETTERS PATENT APPEAL No. 206 of 2003
MR HEMANT S SHAH for Appellant No.
SINGHI & CO for Respondent No. 1

CORAM : HON'BLE DR.JUSTICE J.N.BHATT

and

HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: 23/07/2004

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.N.PATEL)

1. The present appellants (original respondents) have preferred this Letters Patent Appeal against the judgment and order dated 13th August, 2002 passed by this Court (Coram : Akshay H. Mehta,J.) in Special Civil Application No.5354 of 2002, whereby, the learned single Judge has quashed and set aside the action of the appellants (original respondents) of issuance of show cause notices dated 21st August, 2000 and 20th February, 2002.

2. Being aggrieved by the aforesaid order, the present appellants (original respondents) have preferred the present Letters Patent Appeal.

3. Learned counsel appearing for the appellants has mainly submitted that the appellant No.1 - authority (original respondent) has issued only show cause notices. Instead of replying the said show cause notices, the respondent (original petitioner) has preferred writ petition before this Court which is premature in nature and hence, ought to have been rejected by the learned single Judge. It is also contended by the learned counsel appearing for the appellants that as per the provisions of Section 75 of Sub-Clause (1)(g) of the Employees' State Insurance Act, 1948 (for short "the E.S.I. Act"), the respondent (original petitioner) could have approached the Employees Insurance Court, there was availability of efficacious alternative remedy and, therefore, also the order passed by the learned single Judge deserves to be quash and set aside.

4. It is contended by the learned counsel appearing for the respondent (original petitioner) that both the show cause notices, which are at Annexure-C and E of the memo of the original petition dated 21st August, 2000 and 20th February, 2002 are patently erroneous, bad in law, de-horse the provisions of the E.S.I. Act and the principles of natural justice. In both the aforesaid show cause notices, without determination of the contributions under Section 45A of the E.S.I. Act, the appellant No.1 (original respondent) has arrived at a final conclusion, as to the liability of the respondent (original petitioner). The relevant part of the said notice dated 21st August, 2000 reads as under :-

"I am therefore, to call upon you to Show Cause within 10 days from the date of receipt of this letter why you as one of the principal employers of the factory of M/s.Allocare Laboratories

should not be prosecuted for the said offences under Section 85/85-A/85-C of the ESI Act, 1949. Please note that in case you have deducted the ESI contribution, from the wages of the employees, but not paid the same to the Corporation, for the wage period as mentioned in item No.3 above, you will render yourself liable to be prosecuted under Section 406 of the I.P.C."

Similar observation is also made in the notice dated 20th February, 2002. It is, therefore, contended by the learned counsel for the respondent (original petitioner) that in aforesaid show causes notices, there is a contravention of the E.S.I. Act and the principles of natural justice, as the original petitioner never heard before the determination of the contribution as required, to be done firstly under Section 45A and then the notices can be issued to initiate the action against the original petitioner under Sections 85/85-A/85-C of the E.S.I. Act and, therefore, it is rightly observed by the learned single Judge that no opportunity of hearing has ever afforded to the original petitioner despite its repeated request. Therefore, there is violation of provisions of Section 45A of the E.S.I. Act. When such mandatory provisions have not been complied with, the action taken by the appellants (original respondents) cannot be sustained.

5. Considering the submissions made by the learned counsels for both the parties and order passed by the learned single Judge, it is worthwhile to read Section 45A of the E.S.I. Act, which reads as under :-

"45A. Determination of contributions in certain cases - (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

Provided that no such order shall be passed by the Corporation unless the principal or immediate

employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

- (2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B or the recovery under sections 45C to 45I."

Thus, from the proviso of Section 45A (1), it is explicit that before determination of the contribution under the provisions of the E.S.I. Act, the principal or immediate employer or the person incharge of the factory or establishment has to be given an opportunity of being heard. The show cause notices have been issued, to show cause, by the appellants (original respondents) as to why the action should not be initiated against the respondent (original petitioner) under Sections 85/85A/85/C of the E.S.I. Act. The said sections read as under :-

"85. Punishment for failure to pay contributions, etc.
- If any person -

- (a) fails to pay any contribution which under this Act he is liable to pay, or
- (b) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution, or
- (c) in contravention of section 72 reduces the wages or any privileges or benefits admissible to an employee, or
- (d) in contravention of section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or
- (e) fails or refuses to submit any return required by the regulations, or makes a false return, or
- (f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or
- (g) is guilty of any contravention of or noncompliance with any of the requirements of this Act or the rules or the regulations in respect of which no special penalty is provided,

he shall be punishable -

- (i) where he commits an offence under clause (a), with imprisonment for a term which may extend to three years but -

(a) which shall not be less than one year, in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages and shall also be liable to fine of ten thousand rupees;

(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees;

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand rupees, or with both.

85A. Enhanced punishment in certain cases after previous conviction -

Whoever, having been convicted by a court of an offence punishable under this Act, commits the same offence shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to two years and with fine of five thousand rupees;

Provided that where such subsequent offence is for failure by the employer to pay any contribution which under this Act he is liable to pay, he shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to five years but which shall not be less than two years and shall also be liable to fine of twenty thousand rupees.

85C. Power of Court to make orders. - (1) Where an employer is convicted of an offence for failure to pay any contribution payable under this Act, the Court may, in addition to awarding any punishment, by order, in writing, require him within a period specified in the order (which the court may if it thinks fit and on application in that behalf, from time to time, extend), to pay the amount of contribution in respect of which the offence was committed, and to furnish the return relating to such contributions.

(2) Where an order is made under sub-section (1), the employer shall not be liable under this Act in respect of

the contribution of the offence during the period or extended period, if any, allowed by the court, but if, on the expiry of such period or extended period, as the case may be, the order of the Court has not been fully complied with, the employer shall be deemed to have committed a further offence and shall be punishable with imprisonment in respect thereof under section 85 and shall also be liable to pay fine which may extend to one thousand rupees for every day after such expiry on which the order has not been complied with."

6. From the aforesaid provisions, it is clear that the action can be initiated under Section 85/85A/85C of the E.S.I. Act from when the liability for the contribution arises. In the present case, the appellant authority (original respondent) has issued notices, as if and on the belief that the contribution liability has already been, finally, decided under Section 45A of the E.S.I. Act. It is clear from the aforesaid two impugned notices issued by the present appellant authority, dated 21st August, 2000 and 20th February, 2002 that the question or issue of statutory liability for contribution, as envisaged, in Section 45A of the E.S.I. Act has, finally, been decided and the same can legally be decided only after giving an opportunity of being heard to the respondent (original petitioner). Even then, at this stage, we had called upon the learned counsel for the appellants to verify the factual position as to whether the legal liability for contribution to be paid by the respondent (original petitioner) has been determined or not. It is made clear by the learned counsel for the appellants that still there is no final determination of contribution under Section 45A of the E.S.I. Act. In fact, in the process of finalization of the assessment of the contributions under Section 45A of the E.S.I. Act, the present respondent (original petitioner) was called upon to produce necessary and relevant documents before the appellants (original respondents). But instead of presenting such documents, the original petitioner has preferred the petition.

7. Thus, the learned counsel, for the appellants, could not point out the exact amount, which is to be paid by the respondent (original petitioner). If, this argument canvassed by the learned counsel for the respondent is accepted, then the whole basis of the aforesaid two notices would become patently and palpably violative of the provisions of the E.S.I. Act. The notices have been issued for initiating the action as contemplated under Sections 85/85A/85/C of the E.S.I. Act, which could follow only after aforesaid statutory

process has been undergone. This action cannot be initiated unless and until the contribution is finally decided and determined under Section 45A of the E.S.I. Act. Thus, without determination or without quantification of the contribution as envisaged under Section 45A of the E.S.I. Act, which is sine-qua-non for followed up actions like the notices dated 21st August, 2000 and 20th February, 2002 (impugned in this petition) cannot be issued by the appellants (original respondents).

8. In view of the aforesaid facts, we are of the opinion that there is no error or illegality committed by the learned single Judge in passing an order dated 13th August, 2002 in Special Civil Application No.5354 of 2002. There is no substance in this appeal and hence, it is required to be dismissed. Accordingly, this appeal is dismissed. Without costs. No order in Civil Application No.1401 of 2003 on the ground that, now, it assumes no survival value. No cost for that.

[J.N.Bhatt,J.]

[D.B.Patel,J.]

(vijay)